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In The

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# Supreme Court of the United States

STANLEY REINISH and CAROL REINISH individually and on behalf of all others similarly situated,

*Petitioners,*

v.

JOHN K. CLARK, in his official capacity as Tax Collector of Palm Beach County, Florida and as representative of other county tax collectors in the State of Florida, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The District Court Of Appeal, First District, State Of Florida**

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## ARGUMENT

### A. The Reinishes are Ineligible for the Homestead Tax Exemption Because They are Nonresidents, not Because of Their Use of Their Property, Which is Identical to Their Neighbors' Residential Use.

Respondents make the baseless assertion that Florida's "homestead exemption is tied to the use of the subject property, not to the identity or residence of the user." (Brief for Respondents in Opposition ["Resp. Br."] at 6-7. *See also id.* at 2, 11.) But the Reinishes and their Ocean Ridge neighbors (permanent Florida residents) use their homes for the same purpose – as residential property. The Reinishes, however, are ineligible for the Homestead Tax Exemption[1] and the Save Our Homes provision,[2] solely because they are not permanent Florida residents. Neither standard land use practice nor this Court's rulings have accepted such a classification of residential property solely on the basis of the identity or state of residence of its owners. *See generally City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 447-50 (1985); *Moore v. City of East Cleveland*, 431 U.S. 494, 505-06 (1977).

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[1] Permanent Florida residents – and only permanent residents – can exclude the first $25,000 worth of one piece of Florida residential property from *ad valorem* taxes every year they own it. *See* Fla. Const. art. VII, § 6 and Fla. Stat. § 196.031 (described in Petition at 1 and reproduced in Petitioners' Appendix ["Pet. App."] at 47-49).

[2] Florida permanent residents are provided the further economic advantage of a cap upon any future increases in the assessed value of their property (3% or less per year). *See* Fla. Const. art. VII, § 4(C) (described in Petition at 2 and reproduced in Pet. App. at 45-46).

**B. The Purposes for the Homestead Tax Exemption Alleged by Respondents Were Never Adopted by the Legislature and Cannot Justify the Discrimination.**

Respondents manufacture two alleged "purposes" for the Homestead Tax Exemption – "assisting taxpayers with the tax burdens of owning their primary residences" (Resp. Br. at 2) and "promoting the stability and continuity of the primary permanent home." (*Id.* at 5.) Neither hypothetical purpose can be considered sufficient. First, Respondents still fail to identify any statutory language (in the original 1934 Act or any of its many amendments) in which Florida's Legislature (as opposed to its appellate attorneys) has ever treated these as the purposes for the Homestead Tax Exemption.[3] (*See* Petition for Writ of Certiorari ["Pet."] at 16.) Respondents' attempt to rely upon a purpose never articulated by the Legislature is in direct conflict with *City of N.Y. v. State*, 94 N.Y.2d 577, 594-95, 730 N.E.2d 920, 928-29 (2000) (described in Pet. at 18).[4] Second, the financial assistance purpose must fail, because it is not a legitimate state purpose to benefit local taxpayers at the expense of nonresident taxpayers. *See, e.g., Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 296-97 (1998); *Austin v. New Hampshire*, 420 U.S. 656,

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[3] Though Respondents initially contend that the Legislature need not state a purpose for the exemption, *see* Resp. Br. at 7-8, one page later they acknowledge, as they must, that the State can overcome a Privileges and Immunities Clause claim only if it can demonstrate a "substantial reason for the difference in treatment." *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998). *See* Part C, below. Yet, Respondents cite no statutory language supporting their *post hoc* appellate argument, nor did they seek to introduce evidence at trial regarding possible legislative purpose.

[4] *See also Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 682 n.3 (1981) (Brennan, J., concurring), and sources cited therein.

665-66 (1975); *City of N.Y.*, 94 N.Y.2d at 597, 730 N.E.2d at 930. It remains undisputed that any Florida resident who owns residential property can obtain one homestead tax exemption, while no nonresident can possibly obtain such an exemption.[5]

Moreover, as detailed in Pet. at 16-17, the hypothesized financial assistance purpose is not furthered by the actual structure and operation of Florida's Homestead Tax Exemption. Respondents attempt to downplay the significance of the acknowledged fact that Florida billionaires receive the same flat amount of homestead exemption as middle-class Florida homeowners (approximately $556.00 each per year, *see* Pet. at 23), by contending that "the relative worth of the exemption diminishes as the assessed value of the property increases." (Resp. Br. at 8.) Respondents' attempt must fail, first because it assumes a direct correlation between house value and personal income. *See San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 23 (1973).[6]

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[5] Even the court below conceded: "As a practical matter, those persons who are eligible to receive the homestead tax exemption will be Florida residents, for they are the taxpayers who have permanent residences in this state." *Reinish v. Clark*, 765 So. 2d 197, 208 (Fla. Dist. Ct. App. 2000). Respondents, while acknowledging this point (Resp. Br. at 7), speculate about the possible remedy and legislative response to the possible remedy. (*Id.* at 10 n.5.) Such speculation is both premature and hypothetical. Were this Court to grant this Petition and conclude that the challenged laws are unconstitutional, then the Florida Legislature could decide whether to repeal or to extend the scope of the homestead exemption for the future.

[6] If Florida really wanted to benefit the poorest homeowners, it could adopt a circuit breaker, which would provide more property tax relief to persons with lower incomes. *See, e.g.*, Wis. Stat. Ann. § 71.54 (West 2000 Supp.) *See generally* 1 Advisory Comm'n on Intergovernmental Relations, *Significant Features of Federalism* 130-37 (Table 35) (1995).

Further, Respondents have totally disregarded the Save Our Homes cap (though they acknowledge it is challenged in this case). *See supra* note 2. That severe 3% cap on assessment increases for permanent-resident owners will frequently provide greater benefits for higher-value homes in areas where residential property values are climbing. (*See* Pet. at 23.) Therefore, the two permanent-resident-only benefits challenged in this case can hardly be considered "specific, narrowly defined" benefits for lower-income persons needing assistance in maintaining their homes.

Nor is the hypothesized "stability and continuity" purpose furthered by allowing the homestead exemption for Floridians who do not actually occupy their property,[7] while denying it to the Reinishes, who occupy their Florida home four to five months out of every year.

Therefore, when viewed realistically, the challenged laws actually provide substantial property tax relief on a general basis to all Floridians who own one house in the state – relief which is never available to any nonresident homeowners. The court below acknowledged this discrimination against nonresidents, *see supra* note 5, but sought to justify it by making misguided comparisons between the Reinishes and certain subgroups of Florida residents – comparisons which are in conflict with decisions of this Court and of other state courts of last resort. (*See* Pet. at 9-15.) Respondents do not appear to dispute the existence of these serious conflicts.

### C. Respondents Have not Refuted Petitioners' Showing that the Decision by the Court Below Conflicts with Key Privileges and Immunities Clause Decisions.

Of the half-dozen conflicting state decisions concerning the Privileges and Immunities Clause that are cited in

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[7] *See* cases and Fla. Att'y Gen. Op. described in Pet. at 17 n.8. *See also infra* note 10.

the Petition, Respondents mention only two, which they seek to distinguish by a wave of the hand, never confronting the conflict there presented. Instead, Respondents cite *Rubin v. Glaser*, 83 N.J. 299, 416 A.2d 382, *app. dism.*, 449 U.S. 977 (1980), even though that case has already been rejected by this Court in *Lunding*, 522 U.S. at 306 & n.3. (*See* Pet. at 20, 29.)

Indeed, Respondents never come to grips with this Court's rigorous two-part Privileges and Immunities Clause test. (*See* Pet. at 15-21.) Instead, they quote, out-of-context, an irrelevant passage from *Martinez v. Bynum*, 461 U.S. 321, 328 (1983). (*See* Resp. Br. at 9 n.4.) *Martinez*'s very next sentence states: "Such a [bona fide residency] requirement with respect to attendance in public free schools does not violate the Equal Protection Clause." *Id.* at 328. This contextualizing sentence, coupled with the sentence quoted by Respondents (regarding bona fide residency requirements for "services provided for its residents"), actually demonstrates the great inequity of the challenged Florida laws. Tellingly, Petitioners (and their putative class) actually pay more real estate taxes because they are ineligible for the homestead exemption and cap upon assessment increases, yet they are denied many tax-financed services (such as the public schools considered in *Martinez*) that are freely available to Florida residents (who pay lower property taxes).

The passage Respondents quote from *Lunding* speaks of "justified and reasonable distinctions between residents and nonresidents" in tax schemes. Yet, Respondents neglect to note that *Lunding* also explains how such distinctions are tested: "Tax provisions imposing discriminatory treatment on nonresident individuals must be reasonable in effect and based on a substantial justification other than the fact of nonresidence." *Lunding*, 522 U.S. at 314 (emphases added). As noted above and in the Petition, Respondents have failed to establish such a "substantial justification" for the discrimination against nonresidents and have provided an inadequate explanation "of how the discrimination relates to nonresidents." *Id.* at 299.

### D. Respondents' Dormant Commerce Clause Argument is Deeply Flawed.

Initially, Respondents muse: "it is not at all clear that petitioners, as owners of residential property, may invoke the commerce clause to challenge the taxation of that property." (Resp. Br. at 10 (emphasis added).) They seek support for this novel proposition by wrenching a quotation out-of-context from *General Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997). But much of the *Tracy* opinion discusses the special role the dormant Commerce Clause does play in protecting consumers. *See id.* at 286-87.[8] The instant case concerns consumers of residential real property.

Second, the *Tracy* facts and holding concerned two separate groups of natural gas purchasers, who competed in two different markets. In the instant case, however, Florida permanent residents and the Reinishes (part-time residents) are in direct competition in one single market for consumption of an identical product – Florida residential property. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 583 n.16 (1997) (distinguishing *Tracy* on this very basis).

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[8] This is not surprising, given this Court's insistence that unconstitutional "[e]conomic protectionism is not limited to attempts to convey advantages to local merchants; it may include attempts to give local consumers an advantage over consumers in other States." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580 (1986). *Accord Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 584-85 (1997) (protection for "consumers," individuals, and nonprofit activities); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949) ("every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation from any"); *City of N.Y.*, 94 N.Y.2d at 597, 730 N.E.2d at 930 (dormant Commerce Clause rights of individual taxpayers).

Third, Respondents' own quotation from *Tracy* reaffirms that the dormant Commerce Clause covers "participants in markets," 519 U.S. at 300. The Reinishes (and their putative class) are participants in the Florida residential property market, and they are handicapped in competing in that market by the challenged laws. Thus, Florida residents who purchase residential property can obtain both the annual homestead exemption, *see supra* note 1, and the benefit of the 3% cap upon annual increases in assessments, *see supra* note 2, which together substantially reduce their carrying costs. Because nonresidents (like the Reinishes and their putative class) can never obtain either of these unconstitutional competitive advantages, they must carry the full, ever-escalating costs of their Florida residential property for as long as they own it, and they will realize less overall gain should they ever sell it.

Next, Respondents assert that any nonresident "who purchases residential real estate in Florida and then makes that property his or her permanent home . . . will be fully entitled to claim the homestead exemption for the purchased property." (Resp. Br. at 11 (emphasis added).) This astonishing proposition misses the whole point of dormant Commerce Clause analysis, because it would require a nonresident to overcome a discriminatory tax by becoming a citizen of the state which is discriminating against her. Under Respondents' bizarre reasoning, the taxpayer plaintiffs in *City of N.Y. v. State*, 94 N.Y.2d 577, 730 N.E.2d 920 (2000); *General Motors Corp. v. Director of Rev.*, 981 S.W.2d 561 (Mo. 1998); and *Annenberg v. Commonwealth*, 562 Pa. 570, 757 A.2d 333 (1998), did not have a Commerce Clause claim against the discriminatory taxes invalidated in their cases, because they could have moved to the state involved, changed their citizenship, and shared in the discriminatory tax benefit. (*See* Pet. at 24-26 (analyzing these three cases).)

Respondents further contend that Florida has not burdened interstate commerce. Given the facial discrimination of the Homestead Tax Exemption, it should be judged under the *per se* dormant Commerce Clause test, *see* Pet. at 23-24, 26, so it is not necessary to consider Respondents' contention that the exemption has not burdened interstate commerce. It is, however, clear that Florida has burdened interstate commerce. The Commerce Clause covers competition for natural resources, including real estate. *See, e.g., McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 246 (1980); *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978). As noted above, the Florida laws challenged here give Florida residents a clear and continuing unconstitutional advantage in the economic competition with nonresidents for this resource. *See New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982) (Commerce Clause precludes state from giving its residents "a preferred right of access, over out-of-state consumers, to natural resources located within its borders").

**E. Respondents Have not Refuted Petitioners' Showing that the Decision by the Court Below Conflicts with the Relevant Equal Protection Clause Decisions, nor can Respondents Establish that Florida's Discriminatory Tax Scheme is Part of a "Widespread Tradition."**

As demonstrated in Pet. at 27-29, the decision by the court below conflicts with the Equal Protection Clause decisions of this Court that have rejected discriminatory state taxes. First, Respondents reassert their *post hoc* manufactured purposes for the challenged laws, an argument that is rebutted in Part B, above.

Next, Respondents boldly assert that there is a "widespread tradition of granting homestead exemptions" and that "virtually every State in the Nation" provides a homestead exemption comparable to Florida's.

(*See* Resp. Br. at 7, 12.) Their sole source is Table 36 of 1 Advisory Comm'n on Intergovernmental Relations, *Significant Features of Federalism* 138-43 (1995) ["ACIR Report"]. But Table 36 actually reveals that a majority of the states listed there provide benefits only for elderly or disabled persons and/or veterans – provisions that are not challenged in this case. Caselaw research teaches that South Dakota does not have a residence-based homestead exemption, because the State Supreme Court opined that such a scheme would be unconstitutional. *See Opinion of the Judges*, 81 S.D. 629, 632, 140 N.W.2d 34, 35-36 (1966).[9]

In their final footnote, Respondents hide a more accurate count – Table 36 of the ACIR Report shows that some 18 states have a general homestead tax exemption. (Resp. Br. at 12, n.7.) But several of the schemes in those states are not really comparable to Florida's; some have circuit breakers which tailor and target the exemption, by providing more tax relief for homeowners with lower incomes, *see supra* note 6, instead of the flat $25,000 exemption available across-the-board to all (whether middle-class or billionaire) who own permanent residences in Florida. More significantly, Florida is one of the few states that allows residents to claim the exemption even if they do not actually, physically occupy the exempt home.[10] *See generally* Part B, above, and Pet. at 17.

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[9] *See also Borden v. Selden*, 259 Iowa 808, 811, 146 N.W.2d 306, 309 (1966) (statute denying nonresident owners an agricultural land tax credit that was available to resident landowners violated Privileges and Immunities Clause). The South Dakota and Iowa cases are cited in Pet. at 12, 19-20 to show that there is a conflict of state court decisions justifying a grant of the writ of certiorari in this case. Respondents have supplied no response.

[10] *Compare* Fla. Const. art. VII, § 6(a) ("the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon") (emphasis added) (reproduced in Pet. App. at 47) *with*

Finally, only a few states have adopted assessment limitations available solely to residents (like Florida's Save Our Homes 3% assessment cap). Even fewer seem to have both a residents-only homestead exemption and a residents-only annual assessment cap. Therefore, the challenged Florida laws are not, as Respondents would have this Court believe, part of a benign nationwide pattern. Instead, they are some of the most extreme forms of residents-only real estate tax exemptions and limitations.[11]

Respectfully submitted,

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Okla. Stat. Ann. tit. 68, § 2888 (West 2001) ("the actual residence of a natural person who is a citizen of the State of Oklahoma, provided the record actual ownership of such residence be vested in such natural person residing and domiciled thereon") *and* Tex. Tax Code Ann. § 11.13(j)(1)(D) (Vernon 2001 Supp.) ("is occupied as his principal residence by an owner").

[11] Moreover, even if the homestead exemption provisions in other states were identical to Florida's – which they are not – that would not provide the necessary constitutional justification for Florida's facially discriminatory Homestead Tax Exemption and Save Our Homes provision. Discriminatory tax schemes cannot be made constitutional simply by becoming popular among the state legislatures. *See Freeman v. Hewit*, 329 U.S. 249, 256 (1946) ("The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment."). *See also Austin v. New Hampshire*, 420 U.S. 656, 668 (1975).